Supreme Court, U.S.
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No. 92-1564

In The

Supreme Court of the United States

October Term, 1992

MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

Petitioners,

v.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

Whether Clear Creek Independent School District's policy of allowing students to deliver prayers school officials approve as part of commencement exercises violates the Establishment Clause as a matter of law?

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Petitioners' Reply to Respondent's Motion to Dismiss

Respondent's Brief in Opposition includes a motion to dismiss the petition for *certiorari*, based on the language of Supreme Court Rule 13.4, stating that the filing of a suggestion for rehearing *en banc* does not toll the 90-day time limit for filing a petition for *certiorari*. While respondent's position would be plausible if the language of Rule 13 had never been interpreted by the Court, it is clearly wrong in light of the Court's recent opinion in *Missouri v. Jenkins*, 495 U.S. 33 (1990), holding that a

"petition for rehearing *en banc*" treated by the court of appeals as incorporating a petition for rehearing by the panel did in fact toll the time for filing the petition for *certiorari*. The relevant procedural events in this case are indistinguishable from those in *Jenkins*, and respondent's motion must, therefore, fail.

In *Jenkins*, the petitioner State of Missouri filed a pleading in the court of appeals styled a "Petition for Rehearing En Banc," a title combining aspects of the "petition for rehearing" authorized by Rule 40(a) of the Federal Rules of Appellate Procedure and the "suggestion for rehearing in banc" provided for by Rule 35(b) of the rules. In the case at bar, petitioners' filing in the court of appeals was styled "Appellants' Petition for Rehearing *En Banc*." In *Jenkins*, the Supreme Court held unanimously[1] that the filing did include a petition for rehearing by the panel as well as a suggestion for rehearing in banc, based solely on the order of the court of appeals so characterizing its actions. The Court of Appeals for the Fifth Circuit, in accordance with its usual practice, *Gonzalez v. Southern Pacific Transportation Co.*, 773 F.2d 637 (5th Cir. 1985), expressly treated Jones' filing as containing both a petition for rehearing by the panel and for a rehearing *en banc* and denied both on December 28, 1992. (*Petition for Writ of Certiorari*, App. 22). 86 days later, on March 24, 1993, Jones filed his *certiorari* petition.

In counting the time during which his "petition for rehearing *en banc*" was pending as tolling the time to file

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[1] Justice Kennedy, joined by the Chief Justice and Justices O'Connor and Scalia, dissented on the merits, but explicitly endorsed the majority's resolution of the jurisdictional issue.

a petition for *certiorari*, petitioners relied on the Fifth Circuit's characterization of its own action read in conjunction with this Court's recent and highly relevant decision in *Missouri v. Jenkins*. Clear Creek Independent School District makes no attempt in its motion to dismiss to distinguish this case from *Jenkins*, indeed, it never cites it. The motion to dismiss should be overruled.

CONCLUSION

Petitioners request the Court deny the Respondent's Motion to Dismiss and grant the Petition for Writ of Certiorari.

Respectfully submitted,

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